85-846

Supreme Court, U.S.
FILED
NOV 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. -

In the Supreme Court of the United States.

OCTOBER TERM, 1985

JOHN DEMJANJUK,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

MARK J. O'CONNOR
510 Brisbane Building,
Buffalo, New York 14203,
Counsel of Record,
JOHN J. GILL AND
DAVID C. EISLER,
948 Engineers Building,
Cleveland, Ohio 44114.

Issues Presented

1. Whether in this case of first impression, Petitioner's Due Process rights guaranteed by the United States Constitution were abridged when his Motions to Vacate the 1981 Denaturalization judgment rendered against him were denied, which Motions first brought forth competent and conclusive evidence of perjured testimony and second, brought forth competent and conclusive evidence of Soviet KGB co-prosecutorial fraud.

2. Whether by acting impermissably as the proxy for the Soviet KGB's prosecution of its political case against petitioner, the Office of Special Investigations exceeded the limits set for its function by Congress in 8 U.S.C. § 1551(a)(2), thereby breaking the Constitutional mandate that the Executive, of which the Office of Special Investigations is a part, "take care that the laws are faithfully executed," Article II § 3, United States Constitution.

Table of Contents

Issues Presented 1

1. Whether in this case of first impression, Petitioner's Due Process rights guaranteed by the United States Constitution were abridged when his Motions to Vacate the 1981 Denaturalization judgment rendered against him were denied, which Motions first brought forth competent and conclusive evidence of perjured testimony and second, brought forth competent and conclusive evidence of Soviet KGB co-prosecutorial fraud.

2. Whether by acting impermissably as the proxy for the Soviet KGB's prosecution of its political case against petitioner, the Office of Special Investigations exceeded the limits set for its function by Congress in 8 U.S.C. § 1551(a)(2), thereby breaking the Constitutional mandate that the Executive, of which the Office of Special Investigations is a part, "take care that the laws are faithfully executed," Article II § 3, United States Constitution.

Table of Authorities 4

Parties to the Proceedings 6

Reports of Lower Proceedings 6
(including date of judgment, time of entry and date of order denying rehearing)

Grounds for Supreme Court Jurisdiction 7
(i) Date of order sought to be reviewed;
(ii) Date of order denying rehearing;
(iii) Statutory provision conferring jurisdiction of this Court to review the order.

Constitutional Provisions, Statutes and Court Rules Involved 8

Statement of the Case 11

Argument in Support of the Petition for Certiorari 13

Conclusion 24

Appendix

(i) Circuit Court Opinions — 1a
United States v. *John Demjanjuk* (unreported, C.A. No. 85-3198, June 28, 1985, rehearing den. September 3, 1985)

(ii) District Court Opinions — 4a
United States v. *John Demjanjuk* (unreported, C77-923, N.D. Ohio, E.D. February 12, 1985)

(iii) Testimonial Evidence

(A) Expert Testimony
- (1) Edna Robertson — 12a
- (2) Fabian Tasson — 27a
- (3) Gideon Epstein — 43a

(B) Admission of Valeriy Kubanov — 47a

(C) Survivor Testimony
- (1) Eugenia Samuel — 49a
- (2) Stanislaw Swistek — 51a
- (3) Chiam Sztajer — 53a

(D) Recantations
- (1) Heinrich Schaefer — 54a
- (2) Otto Horn — 56a
- (3) Gerald F. Charig Affidavit — 58a

(E) (1) Embassy Note - U.S.S.R. — 60a
- (2) Polish Ministry of Justice Report — 61a
- (3) Berlin Document Center Report — 62a

(F) "Punishment Will Come," *Soviet Way*, October, 1977 — 64a
"Punishment Will Come" Plate — 66a

(G) Plates — (i)a

Issues Presented

1. Whether in this case of first impression, Petitioner's Due Process rights guaranteed by the United States Constitution were abridged when his Motions to Vacate the 1981 Denaturalization judgment rendered against him were denied, which Motions first brought forth competent and conclusive evidence of perjured testimony and second, brought forth competent and conclusive evidence of Soviet KGB co-prosecutorial fraud.

2. Whether by acting impermissably as the proxy for the Soviet KGB's prosecution of its political case against petitioner, the Office of Special Investigations exceeded the limits set for its function by Congress in 8 U.S.C. § 1551(a)(2), thereby breaking the Constitutional mandate that the Executive, of which the Office of Special Investigations is a part, "take care that the laws are faithfully executed," Article II § 3, United States Constitution.

Table of Authorities

Cases:

Birdsell v. United States, 346 F.2d 775 (5th Cir, 1965)

Cavalliotis v. Salomon, 375 F.2d 157 (2d Cir, 1966)

Fedorenko v. United States, 449 U.S. 490 (1981)

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944)

Hines v. Seaboard Air Lines Railroad Co., 341 F.2d 229 (2d Cir, 1965)

Kent v. Dulles, 357 U.S. 116 (1958)

Klapprott v. United States, 335 U.S. 601 (1948)

Knauer v. United States, 326 U.S. 654 (1946)

Powell v. Zukert, 366 F.2d 634 (DCC, 1966)

S & E Contractors v. United States, 406 U.S. 1 (1972)

Schneiderman v. United States, 320 U.S. 118 (1943)

United States v. Demjanjuk, 680 F.2d 32 (6th Cir, 1981)

United States v. Hawkins, 661 F.2d 436 (5th Cir, 1981)

United States v. Kowalchuk, 773 F.2d 448 (3d Cir, 1985)

United States v. Kungys, 571 F.Supp. 1107 (D.C. N.J., 1983)

United States v. Rose, 570 F.2d 1378 (9th Cir, 1978)

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 574 (1946)

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

Statutes

8 United States Code § 1451(a)

8 United States Code § 1551(a)(2)

Court Rules

R. 60(b)(6), Federal Rules of Civil Procedure

Treatises

7 Moore's Federal Practice at 60-274 (1985)

Parties to the Proceedings

1) The United States of America, by
The Office of Special Investigations
Criminal Division
United States Department of Justice
Suite 195
1377 K. Street, N.W.
Washington, D.C. 20005

per: Neil M. Sher, Esq., Director,
Bruce M. Einhorn, Esq., Attorney, and
Robert J. Brill, Esq. Attorney
for the Plaintiff - Respondent.

2) John Demjanjuk
847 Meadowlane
Seven Hills, Ohio 44131

per: Mark J. O'Connor, Esq.,
John J. Gill, Esq., and
David C. Eisler, Esq., attorneys
for the Defendant - Petitioner.

Opinions Below

A. This case has proceeded in two phases, the initial judgment and order in the District Court was rendered in 1981, and was affirmed by the Sixth Circuit, with this Court denying Certiorari the following year. The case is reported as follows:

United States v. *John Demjanjuk*, 518 F.Supp. 1362 (N.D. Ohio, E.D. 1981), aff'd. 680 F2d 32 (6th Cir. 1982), cert. den. 459 U.S. 1036, 103 S.Ct. 447 (1982).

B. The second phase resulted from petitioner's two Motions to Vacate, on which the District Court rendered its decisions in 1984 and 1985. The Sixth Circuit decided both motions on consolidated appeal. The proceedings regarding the Motions to Vacate are reported as follows:

United States v. *John Demjanjuk*, 1st Motion 103 FRD 1, N.D. Ohio, E.D. (1983); 2nd Motion (unreported, February 12, 1985, N.D. Ohio, E.D., Battisti, J.)

United States v. *John Demjanjuk*, aff'd., C.A. 85-3198 (unreported) June 28, 1985, reh. den. August 26, 1985.

Grounds For Supreme Court Jurisdiction

Jurisdiction of the United States Supreme Court is invoked under the following facts: the United States Sixth Circuit Court of Appeals affirmed a United States District Court's denial of petitioner's F.R. 60(b)(6) Motions to Vacate a 1981 denaturalization judgment rendered in a United States District Court under 8 U.S.C. § 1451(a). The United States District Court was the only forum in which the two (2) Motions to Vacate the 1981 denaturalization judgment could be entertained. The District Court denied both motions, the first on October 23, 1983 and the second on February 12, 1985. The Sixth Circuit Court of Appeals affirmed the District Court on consolidated appeal by decision dated June 28, 1985, and denied petitioner's Motion for Rehearing En Banc on August 26, 1985. The Sixth Circuit recalled and stayed its Mandate, on petitioner's motion, on September 18, 1985. This petition is filed within ninety (90) days of the denial of petitioner's motion for rehearing.

Two Federal provisions decided in the lower Federal Courts are here in issue: 8 U.S.C. § 1451(a), denaturalization, and R. 60(b)(6), Federal Rules of Civil Procedure, Motions to Vacate. This Court's particular jurisdiction to review the United States Sixth Circuit Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1), which allows for review of Federal "cases in the courts of appeal."

Constitutional Provisions, Statutes and Court Rules Involved

1) 8 U.S.C. § 1451(a) — Cancellation of Citizenship:

(a) Concealment of material evidence; refusal to testify. It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [8 USCS 1421(a)] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

2) 8 U.S.C. § 1551(a) — Office of Special Investigations:

"(a) In order to create an independent and objective unit -

"(1) to conduct and supervise audits and investigation relating to programs and operations of the Immigration and Naturalization Service.

"**(2)** to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations, and

"**(3)** to provide a means for keeping the Commissioner of the Immigration and Naturalization Service and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action,

there is hereby established in the Immigration and Naturalization Service of the Department of Justice an Office of Special Investigator (hereinafter in this section referred to as 'the Office')."

3) United States Constitution Article II § 3 (Executive):

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

4) R. 60(b) Federal Rules of Civil Procedure:

(b) Mistake; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Statement of the Case

Petitioner John Demjanjuk was made a naturalized citizen of the United States by a 1958 decree. As a result of a complaint brought by the United States attorney in 1977, pursuant to 8 U.S.C. § 1451, petitioner's citizenship was cancelled in 1981 after a bench trial before Judge Frank J. Battisti of the Northern District of Ohio, Eastern Division. The Sixth Circuit affirmed Judge Battisti's decision in 1982, and this Court denied certiorari the same year. Subsequent to this Court's denial of certiorari, deportation proceedings were instituted before Immigration and Naturalization Service A.L.J. Adolf Angellili. New counsel was retained to handle the deportation litigation.

In the course of preparing the deportation defense case for petitioner, new counsel discovered several fatal defects of proof in the Government's deportation case. First and foremost was the gross fraud perpetrated by the sovereign co-prosecutor Soviet KGB, called throughout the case the "Trawniki Identification Card," which card was produced by the Soviet KGB. This was separately offered as Government's Exhibits 5 and 6 (appended). Counsel also discovered that two government witnesses, Heinrich Schaefer and Otto Horn had testified falsely as a result of government intervention and were ready and, in fact did, recant their testimony. Subsequently, in the deportation proceedings, counsel secured expert testimony of two (2) document examiners, demonstrating the Trawniki Card's complete fraudulence, the admission of Soviet KGB Major Valeriy Kubanov confirming the fraud, and affidavits of three (3) Treblinka survivor-witnesses identifying another person as the Treblinka guard and gas chamber operator "Ivan the Terrible" or "Ivan Grozny," thereby confirming the exoneration evidence of Treblinka survivor Chiam Sztajer.

Counsel, at the urging of A.L.J. Angelilli, then filed a Motion to Vacate the 1981 denaturalization judgment, premised on the recantation of Messrs. Schaefer and Horn. The District Court denied the motion because it needed

> "more substantial, better documented evidence that OSI [Office of Special Investigations, Department of Justice] and the Soviet Government did conspire to deceive this Court," *United States* v. *John Demjanjuk*, 103 FRD 1, 5 (N.D. Ohio, E.D., 1983).

More substantial proof came forth in the second Motion to Vacate: testimony of two expert document examiners, an admission of Soviet fraud by the aforesaid Valeriy Kubanov and affidavits of three (3) Treblinka survivor-witnesses identifying another person altogether as "Ivan Grozny." This proof was summarily rejected by the District Court, which Court did not even consider the proof of the Soviet fraud brought before it. By opinion rendered on February 12, 1985, the District Court not only turned its gaze from the fraud, but also warned counsel that sanctions would be forthcoming were the Soviet Fraud challenged again.

The Sixth Circuit Court heard the consolidated appeal of both motions, rendering its decision on June 28, 1985, stating only that it agreed with the well-reasoned opinions of the District Judge (Op of June 28, 1985, at 4). A motion for rehearing *en banc* was filed on July 5, 1985, the Government was ordered to reply, and the motion was denied on August 26, 1985. A recall and stay of mandate was granted on September 18, 1985.

The essential fact-law finding challenged by both motions was:

> "This Court must conclude that Defendant's failure to disclose his service under the German SS at Trawniki and his later service as an armed guard at Treblinka were material misrepresentations under Sections 2(b) and 10 of the DPA . . . his citizenship must be revoked as 'illegally procured' because he failed to satisfy a statutory pre-requisite of naturalization" *United States* v. *Demjanjuk* 518 F. Supp. 1362, 1381-1382 (N.D. Ohio, E.D. 1981).

That fact-law finding was challenged by both Motions to Vacate. The uncontroverted proof of the Soviet co-prosecutor's fraud in fabricating the Trawniki Identification Card that remains central to that fact-law finding has yet to be considered by any lower court.

Argument in Support of the Petition For Writ of Certiorari

This case presents for review two significant issues: first, whether due process is denied petitioner when, his citizenship revoked as a result of Soviet co-prosecutorial fraud, his Motions to Vacate conclusively demonstrating the fraud are denied in the Courts below. Second, whether the Soviet co-prosecutorial fraud, introduced into the Courts of the United States through our Government's advocates, constituted a breakdown of the Constitutionally mandated Separation of Powers by turning the Article I Office of Special Investigations (OSI) into advocates for a politically motivated fraud and the Article III Court into a tool for political propaganda through its sanctioning of a politically motivated fraud. The co-prosecutorial fraud in issue on both counts is the "Trawniki Identification Card," and the consequent cruel misidentification of petitioner as the Ukranian death guard "Ivan Grozny" or "Ivan the Terrible" of Treblinka.

The Soviet Union's political interest in Nazi Collaborator cases, of which petitioner's case is only one, has been demonstrated in other denaturalization litigations involving Ukranians:

> "[T]he Soviet government has used accusations of war crimes as a means of embarrassing and harassing Ukranian emigrants whom they view as anti-Communist or as advocates of Ukranian nationalism," *United States* v. *Kowalchuk*, 773 F.2d 448 (3d Cir, 1985), slip op at 33, (dissent, Aldisert, C.J.)

The arm of the Soviet government which is the vehicle for these accusations is the KGB or Komitet Gosudarstvennoye Bezopastnosti (Committee for State Security), whose role is both that of espionage and political activism (see *Kowalchuk*, *supra* at 32, 33, n.s.). Petitioner argues below that on the one hand, KGB co-prosecution by means of documentary fraud clearly violated his due process rights, and on the other subverted the Separation of Powers on which the due process rights depended.

I.

In this case of first impression, petitioner's due process rights guaranteed by the United States Constitution were abridged when his Motions to Vacate the 1981 denaturalization judgment were denied, which motions on the one hand brought forth competent and conclusive evidence or perjured testimony and on the other brought forth competent and conclusive proof of Soviet KGB co-prosecutorial documentary fraud.

The petitioner brought forth evidence in his two Motions to Vacate that demonstrated perjury and documentary fraud utterly equivocating the 1981 denaturalization decision they challenged. The benchmark denaturalization cases, *Klapprott* v. *United States* 335 U.S. 601 (1948), *Knauer* v. *United States* 326 U.S. 654 (1946) and *Schneiderman* v. *United States* 320 U.S. 118 (1943) have all characterized denaturalization proceedings as all but criminal, requiring a quantum of proof identical to that in criminal proceedings, *Klapprott, supra* at 611-612. The deprivation of rights entailed by denaturalization is all but banishment, *Klapprott, supra* at 611 and at the very least an important adjudication of status, *Knauer, supra.* Once a person is thrust back to the status of an alien by Court decree, he remains on American soil only so long as the Government allows. This recognition of denaturalization's encompassing impact on a person's life is fundamental to our immigration law, thus:

> "The evidence justifying revocation of citizenship must be 'clear, unequivocal and convincing' and 'not leave the issue in doubt' *Schneiderman* v. *United States* 320 U.S. at 125," *Fedorenko* v. *United States* 449 U.S. 490, 506 (1981).

In the words of *Schneiderman, supra:*

> "This is so because rights once conferred should not be lightly revoked. And more specially is this time when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted," 320 U.S. at 125.

Here, the lower Courts deprived petitioner of his rights to due process when they turned their gaze the evidence that demonstrated the patent equivocation of the proof on which the 1981 denatural-

ization decision reposed. The demonstration and the Courts' response is outlined below. Both Motions focused on the utter equivocation of the 1981 judgment and the doubt cast upon it by multiple frauds — evidenced by Soviet Government admissions, by the recantations of Schaefer and Horn, by the testimony of qualified document experts and by survivor testimony demonstrating that a cruel misidentification had been foisted upon the Courts. A clear case of Soviet co-prosecutorial fraud has been made out and all but willfully brushed aside.

Where third-party fraud has tainted a judgment, *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.* 322 U.S. 238 (1944) and its progeny govern in considering a Motion to Vacate. *Hazel-Atlas, supra* stands for the proposition that third-party fraud so taints and corrupts a judgment that the judgment must be re-opened, see also *S. & E. Contractors* v. *United States* 406 U.S. 1 (1972), *Universal Oil Products Company* v. *Root Refining Company* 328 U.S. 575 (1946).

The fraud of a sovereign co-prosecutor must receive greater and more searching consideration than a District Court's threat of future possible sanctions through which that fraud was channelled. A fraud that corrupts our system of adjudication, thereby threatening the major bulkward of our liberties, must be the basis for voiding the judgment it corrupted once the fraud is exposed, *Hazel-Atlas, supra, Schneiderman, supra.* When the lower Courts brushed aside petitioner's proof of sovereign co-prosecutorial fraud, they denied petitioner his rights to due process that demanded that his proof of fraud be given serious and honest consideration.

Any evidence of fraud that brings the issue in doubt when presented to the Court must at least be examined by that Court, *Fedorenko, supra, Schneiderman, supra, Hazel-Atlas, supra.* A Court cannot avert its gaze from sovereign co-prosecutorial fraud channelled through another branch of the Government. The lower Courts denied petitioner due process when they averted their gaze, the District Court in the first instance, and the Circuit Court when they did not even consider whether the District Court acted within its sound discretion, *Cavalliotis* v. *Salomon* 375 F2d 157, 159 (2d Cir, 1966), *Hines* v. *Seaboard Air Lines Railroad Co.* 341 F2d 229, 232 (2d Cir, 1965).

It is clear under the ruling law above that the District Court's abuse of discretion was a denial of petitioner's due process. The

Circuit Court failed utterly to effectively review this denial of due process by the District Court. A denaturalization judgment must be built of oaken beams. The petitioner clearly demonstrated that the central beams in this case were fashioned from cheap veneer. That the fraud was not challenged at trial (6th Circuit Op of June 28, 1985 at 3) cannot address the evidence of Record that utterly equivocates the judgment. Both Courts fell far short of their obligations, the District Court to consider the equivocating evidence, the Circuit Court to critically review. This patent denial of due process cannot stand for any reason.

The specific bases for each Motion to Vacate are set forth below. The first Motion to Vacate brought forth evidence that utterly equivocated the facts upon which the judgment was based. The second Motion to Vacate brought forth evidence that conclusively demonstrated the third-party fraud that was essential to that 1981 judgment.

A.
The First Motion to Vacate

In the trial court's 1981 opinion, Heinrich Schaefer's testimony was part of the platform on which the authenticity of the Trawniki I.D. Card reposed. The trial courts' opinion reflected that Schaefer was unequivocal concerning the card's character: "Schaefer was shown Government's Exhibit 5 and testified that it was an official I.D. card issued to all persons training at Trawniki, and that he himself had been issued such an I.D. card (T. 215)" 518 F. Supp. at 1366. This testimony has been contradicted by affidavit of Schaefer, who now states that he has never seen such a card (affidavit, paragraph 8,9). That he had declared that he never saw such a card at least suggests a concerted action to present only the testimony that would make the story work. Such concerted action demands relief under Rule 60 (b) (6). To deny the relief sought would exalt finality over due process. Though the affidavit of Schaefer is terse, it is nonetheless a recantation. To exalt finality in this case was a denial of petitioner's due process rights.

Similarly, Otto Horn has recanted his unequivocal testimony that "he had seen Ivan inside the gas chambers," 518 F. Supp. at 1370. Horn, in his present affidavit states that he is equivocal on "Ivan's" identity, certain only as to his build. His recantation

defies interpretation that Appellant John Demjanjuk was "Ivan the Terrible." Here, too, the lower Court exalted finality at the clear expense of petitioner's rights to due process.

A judgment in denaturalization must be supported "by clear, unequivocal evidence which does not leave the issue in doubt," *Klapprott*, *supra*, citing *Schneiderman*. Equivocation cannot be part of the case: our brand of justice, in these kinds of cases, cannot support a judgment that rests even in part upon equivocation. Where equivocation is introduced, due process demands justice must overcome policy. The District Court denied petitioner due process when it brushed aside these equivocations of its 1981 judgment.

B.
The Second Motion to Vacate
— 1 —

Two leading cases interpreting 60(b)(6), *Klapprott*, *supra*, and *United States* v. *Karahalias* 205 F2d 331 (2d Cir, 1953) both clearly state that where substantial justice must be done under the power granted by the rule, there is virtually no time limit. In *Klapprott*, *supra*, a Motion to Vacate a default denaturalization was granted four (4) years after judgment because Klapprott was imprisoned without access to counsel when the denaturalization complaint was served upon him, see *syllabus*. In *Karahalias*, *supra*, there was a similar denaturalization judgment entered on default while Karahalias was in Greece and unable to respond. On appeal, his Motion to Vacate was allowed seventeen (17) years after judgment.

In cases of a foreign co-prosecutor's evidentiary misconduct, of which fraud is clearly a species, the Government may not avail itself of the fruits of that misconduct, *Birdsell* v. *United States* 346 F2d 775 (5th Cir, 1965), *Powell* v. *Zuckert* 366 F2d 634 (DCC, 1966), *United States* v. *Rose* 570 F.2d 1378 (9th Cir, 1978), *United States* v. *Hawkins* 661 F2d 436 (5th Cir, 1981). Hence, due process demands that the Soviet fabrication which seduced both the OSI and corrupted the Court be recognized as a fraud that utterly compromised the denaturalization judgment.

It was only some three (3) years after the final judgment that the second Motion to Vacate was presented, conclusively exposing

the sovereign co-prosecutor's fraud. A Motion to Vacate is properly made under 60(b)(6) whenever substantial justice must be done and the means to do so come to hand, *Klapprott*, *Hazel-Atlas*, *supra*. The cases clearly demonstrate that in these denaturalization cases, *Klapprott*, *supra*, *Karahalias*, *supra*, due process is identical to substantial justice and that R. 60(b)(6) may often be the only vehicle for seeking that due process. Here, due process has been denied petitioner since 1977, through the vehicle of the Trawniki Identification Card, a sovereign co-prosecutor's fraud.

— 2 —

Appellant's argument for relief parallels *Hazel-Atlas*, *supra*. In 1926, the Defendant, Hartford Empire Co., obtained a patent for a glass blowing technique on the strength of a published article calling it a revolutionary device. In 1941, Hazel-Atlas Co., which Hartford Empire Co. had sued on patent infringement, after years of litigation, and in which it was forced to settle with Hartford for One Million Dollars ($1,000,000) verified that the article was fraudulently procured. Hazel-Atlas filed a Bill of Review in the Court of Appeals, which was denied. This Court reversed, ordering the Bill's grant, because:

> "The Circuit Court of Appeals had the power and the *duty* to vacate its 1932 judgment . . . [and] even if Hazel failed to exercise due diligence to uncover the fraud, *relief may not be denied*, on that ground alone, *since public interests are involved*, syllabus at 1, emphasis supplied.

Here, the issue is of compelling public interest: whether due process is denied when citizenship is revoked on the strength of a sovereign co-prosecutor's documentary and testimonial fraud. The District Court was not once, but twice removed from the Soviet co-prosecutor's fraud at trial. Once noticed of the Soviet co-prosecutor's active fraud, however, it denied petitioner due process when it refused to consider petitioner's evidence. The Circuit Court compounded this denial by ratification of the District Court.

Hence, this Court is presented with a sovereign co-prosecutor's fraud at least as effective as that in *Hazel-Atlas*, *supra*, and is petitioned to face at least as grave a public is, for due process on which the petitioner's life depends is at stake. A summary of the

expert proffers demonstrating the fradulence of the Trawniki Identification Card follows.

— a —

Proffer of Edna Robertson

In a sworn statement, certified forensic document examiner Edna Robertson submitted what was marked E-1. The following is a brief outline of her findings, beginning at 11a:

1. Government's Exhibits 5, 5(b) and 32 are similar photographs each of which has to a greater or lesser extent been altered or blocked out and there appears either rips, tears or jagged edges on Exhibits 5; 32(e) and 5(b) that do not appear on Exhibit 35.

2. Government's Exhibits 5; 32(e), 5(b) and 35 appeared to be constructed with different kinds of type on either side of the same exhibit.

3. The original may have been tested for quality of paper, origin and perhaps dating.

4. Government's Exhibits 6 and 6(b) are similar and there is a different kind on either side of the same exhibit.

5. Government's Exhibits 6 and 6(b) express staple hole marks and there are no corresponding staple hole marks on Government's Exhibits 5, 32(e), 35, and 5(b).

6. Questions findings of witness Gideon Epstein.

7. Questions determination that purported Trawniki I.D. Card is an I.D. card.

Mrs. Robertson concluded her sworn statement with:

> "I do believe that with the numerous errors, obvious alterations and blocking out and other discrepancies that I have found and stated above leads me to the opinion that this document (taken as a whole Government's Exhibits 5, 5(b), 35, 6, 6(b) is or may not be authentic."

— b —

Proffer of Fabian Tasson

In a sworn statement Forensic Document Examiner Fabian Tasson submitted what was marked E-2; the following is a brief outline of his findings, beginning at 26a:

1. Questions that Government's Exhibit #5 is an identification card.

2. Regarding Exhibit #5 — found a difference of type on right and left side of said Exhibit.

3. In comparing Exhibits #5, 5(b), and 35 have been altered, blocked out in a different way.

4. Purported Trawniki I.D. Card may have been tested regarding the paper and ink.

5. Regarding Exhibits #6 appears to be staple holes however there are no corresponding holes on Exhibit #5 rendered the opinion that the photograph was fastened to something prior to its being fastened to this document.

6. Official seals appearing on Exhibits 6 and 6(b) are out of sync.

7. Questions head position of photograph.

8. States that the writer who placed the Russian Translation on the exhibit in 1948 could very likely be the same person who wrote in the German word Badenhose which was supposed to have been written in either 1942 or 1943.

9. Believes there was an alteration of the numbers on Exhibit #6 and various letter formations are suspect regarding who maced the writings on said Exhibit.

10. Questions Gideon Epstein's testimony relating to the discovery of numbers with the use of a .10 power magnification where Fabian Tasson was unable to detect any numbers with a magnification to the 400th power.

11. States that there have been other alterations regarding the photograph that appears.

When asked his opinion as to the purported Trawniki I.D. Card's authenticity, Mr. Tasson stated:

> "In my opinion it is not authentic, it appears to me based upon the foregoing that this card has been materially altered thereby removing any authenticity it may have and in my opinion it is strongly purported to being non-authentic for the purpose it is allegedly described to have been."

These proffers more than put the card's authenticity in issue, they demonstrate its fraudulence. These proffers are appended. The gravity of the allegations levelled at appellant cannot turn a fraud into a fact. The horrifying glamor the case cast upon the trial court cannot vouch for the authenticity of a fraud.

— c —

The District Court refused appellant's motion to vacate. It went further to threaten counsel with sanctions if ever the authenticity of the card was questioned again.

The Motion had the highest merit, as demonstrated above. A court is to seek final judgments, but that mandate is tempered by the parallel mandate that in so seeking those final judgments, it renders due process by doing substantial justice, Rule 60 (b) (6), *Klapprott*, *supra*, *Hazel-Atlas*, *supra*, 7 Moore's Federal Practice at 60-274, which states:

> "It [Rule 60 (b) (6)] is intended to be a means for accomplishing justice in exceptional situations."

This is indeed an exceptional case, as a panel of the Sixth Circuit had already recognized, *United States* v. *Demjanjuk*, 680 F2d 32, 33 (6th Cir, 1981). To refuse this motion was to refuse that recognition and likewise to refuse the law and the facts bearing on this case. The motion was premised on exceptional facts, but the law is clear, as is the conclusion the law entails. The Court's below denied petitioner due process.

In conclusion, the Courts below denied petitioner due process when they refused to consider the sovereign co-prosecutor's fraud. Petitioner respectfully urges certiorari be granted to review the role of the Soviet co-prosecutor in the denial of petitioner's due process rights.

II.

By acting impermissably as proxy for the Soviet KGB's prosecution of its political case against petitioner, the OSI exceeded the limits set for its function by Congress in 8 U.S.C. § 1551(a)(2), thereby breaching the Constitutional mandate that the Executive, of which OSI is a part, "take care that the Laws are faithfully executed," Article II § 3, United States Constitution.

The OSI more than simply co-prosecuted the denaturalization case against petitioner with the Soviet KGB, it acted as the KGB's proxy. The record, including the "Soviet Way" article of 1977 titled "Punishment Will Come," the fraudulent Trawniki Identification Card, the admission by Soviet KGB Major Kubanov, the maintenance of the original fraud (District Court Exhibits "Original 5 and 6") by the Soviet Embassy in Washington, and the Soviet allegations of Vlassov Army anti-Soviet service, clearly points to the Soviet's unmistakable role as architect of petitioner's prosecution. The OSI's statutory authority under 8 U.S.C. § 1551(a)(2) is to detect immigration fraud. While the puntitive purpose of the OSI's case against petitioner was to detect and prosecute such alleged immigration fraud, the record in the District Court reveals clearly that for all substantive purposes it was a war crimes trial orchestrated by the KGB.

The concealment of war crimes at the time of petitioner's entry would have precluded his immigration to the United States. The case went well beyond mere fraud, however, into the realm of the KGB case of petitioner as Nazi Anti-Soviet collaborator. Judge Aldisert's dissent in *Kolwalchuk, supra,* and the District Court opinion in *United States* v. *Kungys* 571 F.Supp. 1107 (D.C. N.J., 1983) clearly sets forth the manner in which the Soviet KGB has used the OSI as its proxy in these Nazi Collaborator cases.

The conduct of OSI, in this case, set forth above, clearly demonstrates that it went beyond its § 1551(a)(2) mandate by acting as a United States proxy for a fraudulent Soviet case. As such, it exceeded its power under the Constitution to "take care that the laws are faithfully executed," Article II § 3. Petitioner demonstrated that OSI was at best reckless and at worst a knowing conduit of Soviet KGB fraud.

The few cases decided by this Court interpreting Article II § 3

all clearly indicate that OSI's executive conduct was an encroachment on Congressional power. In *Kent* v. *Dulles* 357 U.S. 116 (1958), the Secretary of State's power to regulate the issuance of passports came into issue because he refused to issue passports to two persons, Rockwell Kent and Dr. Walter Briehl, who were alleged Communists. This Court held that the Secretary of State was not delegated the power to restrict the travel of Communists by Congress, hence, despite the allegations, had to issue passports to Kent and Briehl. This Court concluded saying:

> "We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations," at 115.

Similarly, in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), this Court looked first for a Congressional grant of authority for the Executive conduct, at 585, then sought some Constitutional authority for the Executive's conduct. Finding that the Executive had no legislative authority to seize steel mills, even in the interests of national defense, this Court affirmed the District Court that held no such power inhered to the Executive, only to Congress, at 589.

Here, a like analysis applies: either the OSI has authority under § 1551(a)(1) to proxy for Soviet KGB fraud or it does not. Clearly, the terms of § 1551(a)(1) does not authorize such a proxy. Lacking Congressional authority, either the OSI had Constitutional authority to proxy for Soviet KGB fraud or it does not. Assuming even the possibility, absent Congressional action "to make laws necessary and proper to carry out the powers vested by the Constitution," the OSI could not act as the Soviet KGB proxy, *Youngstown Sheet & Tube Co.*, *supra*, at 588-589. No such Congressional law sets out how the Executive may act as a Soviet KGB proxy in prosecutions against its own citizens.

Hence, the OSI has clearly breached its Article II § 3 mandate. For this reason the decisions of the Courts below must be reversed.

Conclusion

For the foregoing reasons, petitioner urges that his petition for writ of certiorari be granted.

Respectfully submitted,

MARK J. O'CONNOR
510 Brisbane Building,
Buffalo, New York 14203,
Counsel of Record,
JOHN J. GILL AND
DAVID C. EISLER,
948 Engineers Building,
Cleveland, Ohio 44114.